IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 26, 2007 Session

STATE OF TENNESSEE v. DREW DAVID KIRKMAN

Appeal from the Criminal Court for Bradley County
No. M02-165 Carroll Ross, Judge

No. E2006-01152-CCA-R3-CD - Filed October 10, 2007

The defendant, Drew David Kirkman, appeals his convictions in the Criminal Court for Bradley County on two counts of first degree murder and two counts of aggravated robbery. He contends that his pretrial statements to police and the evidence obtained from these statements resulted from an illegal arrest and detention, and therefore the trial court erred in overruling his motion to suppress the statements and evidence. The defendant also contends that the trial court erred in refusing to grant his motion for a mistrial based on the state's arguing facts not in evidence during its closing argument. The trial court imposed consecutive sentences, which the defendant also challenges on appeal. We conclude that the defendant's arrest violated the Fourth Amendment to the United States Constitution and was therefore illegal. As a result, the first statement given by the defendant and the evidence disclosed by the defendant in that statement were erroneously admitted by the trial court. However, we conclude that these errors were harmless beyond a reasonable doubt and did not prejudice the defendant. Furthermore, the evidence found by the police based on information gained from a person named by the defendant in that statement was properly admitted, as the circumstances surrounding the disclosure and eventual discovery of that evidence were such that the connection between the evidence and the illegal arrest was broken. The second statement given by the defendant, containing the confession, was properly admitted in that it was taken after the defendant's appearance before a magistrate, thereby breaking the connection between the illegal arrest and the second statement. We also conclude that the trial court properly refused to declare a mistrial and was correct in imposing consecutive sentences. Based on our conclusions, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Randy Rogers, Athens, Tennessee, for the appellant, Drew David Kirkman.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Steven Bebb (on appeal) and Jerry N. Estes (at trial), District Attorneys General; Stephen Crump, (at trial) Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record indicates that in March 2002, a Bradley County grand jury indicted the defendant on two counts of first degree murder, two counts of felony murder, and two counts of aggravated robbery. The defendant filed pre-trial motions to suppress statements given to the police and physical evidence obtained from these statements. The trial court denied these motions. Following a jury trial, the defendant was convicted on all counts of the indictment, with the trial court merging the first degree murder and felony murder counts and sentencing the defendant to an effective sentence of life in prison plus twenty years. This appeal follows.

FACTS

According to a statement given by the defendant to police, the defendant was involved in a check cashing scheme with several other individuals, including Elka Fallis,[1] Jeff Cross, Daniel Goldston, and Candace Tracy Clayton. The defendant said that on the evening of Monday, January 28, 2002, Fallis became upset, claiming that Goldston and Clayton were attempting to "screw over" the other members of the operation. Fallis then suggested that she, the defendant, and Cross go over to the residence Goldston and Clayton shared to "pop" them, meaning shoot them. The three then went over to Goldston and Clayton's residence, where a heated argument occurred between Goldston and Fallis. The defendant claims he calmed down Fallis and Goldston before the argument escalated further.

The next morning, the defendant reported to his parole officer, Nancy Baker, for a general intake. At the motion to suppress hearing, Baker testified that she gave the defendant a drug test, and he tested positive for cocaine, amphetamines, and THC. Baker testified that at the time of the intake, she told the defendant that she was not going to "violate him" that morning, but that "he better be clean the next month." However, on February 4, after the defendant had been arrested in the instant case, Baker filed a probation violation warrant. Baker also testified that she did not request that the defendant be held without bond on the misdemeanor possession charge.

The defendant told police that he, Fallis, and Cross returned to Goldston and Clayton's residence the evening of Tuesday, January 29. After a brief discussion, Goldston began smoking

[1] Fallis was originally indicted as a co-defendant. She was not a party to these proceedings, and it is unclear from the record whether Fallis was ever brought to trial.

crack cocaine before handing the crack pipe to the defendant. While the defendant was smoking, Fallis began shooting at Goldston and Clayton.[2] The defendant claimed that he stabbed Goldston once in the back, breaking his knife, and that Cross may have stabbed one of the victims. After the defendant stabbed Goldston, he saw Fallis hit Clayton with a table leg. The defendant also stated that he hit Goldston "quite a few times" with a club. The three then left the residence, with the defendant taking knives and $400 in cash from Goldston's pocket on the way out. After the defendant returned to his apartment, he took several bags containing items taken from the victims' apartment to a dumpster. The defendant also gave someone, whom he did not identify, a typewriter used in the check cashing scheme and a gun. The defendant told this person to "get rid" of the gun in a creek.

The defendant told police that Elvenia Franklin took him to work Tuesday night. At trial, Monte Boring testified that he worked with the defendant that night at Advanced Photographic Solutions. According to Boring, the defendant said that he "took care of that n—r what was causing us trouble." Boring claimed that the defendant then said "[y]ou'll read about it in the papers," and that the defendant mentioned that he had gotten his knife back, as well as something about a carpet being cleaned. Later, Boring heard news reports about Goldston's murder. In his first statement to police, the defendant denied making these statements to Boring. Rather, the defendant, who said he was under the influence of drugs when he reported to work that evening, claimed that he told Boring that he was "f—ed up as two n—s." In his first statement to police, the defendant expressed concern that he was being implicated in the crime by Boring, a known drug addict.

Franklin testified that she took the defendant home from work after his shift ended Wednesday morning. At that point, the defendant gave Franklin a typewriter used in the check cashing scheme. A short while later, Franklin followed the defendant to Fallis's house, where the defendant gave Franklin a small handgun.

Lieutenant John Dailey with the Cleveland Police department testified that he investigated the crime scene. Lieutenant Dailey stated that Clayton had suffered a severe head injury, as well as other injuries to her torso. He also noticed that a coffee table had two legs broken, with one missing and one located next to Clayton's body. Lieutenant Dailey testified that Goldston had suffered visible head injuries, and additional examination revealed stab wounds and gunshot wounds. Goldston also had a knife blade sticking out of his back, with the handle broken off. Throughout the residence, Lieutenant Dailey noted several shoe prints which appeared to be made by a K-Swiss sneaker. He also saw a broken club lying next to Goldston, containing what appeared to be blood and human hair, though the officer did not indicate the color of the hair or to whom it belonged. Tennessee Bureau of Investigation (TBI) Special Agent Bradley Everett later performed tests on the club that indicated the club contained blood from both victims.

[2] Contrary to the defendant's assessment, the autopsy reports indicate that Clayton was not shot.

Dr. Ronald Toolsie, who conducted the autopsies on both victims, testified at trial that Clayton suffered massive blunt trauma injuries to her face and scalp. In his autopsy report, Dr. Toolsie ruled the death a homicide, with the cause of death being "[m]assive craniocerebral injuries with skull fractures due to multiple injuries to left face, left parietal scalp and left occipital scalp." Dr. Toolsie testified that Goldston suffered six stab wounds to the back and two gunshot wounds, which Dr. Toolsie claimed were consistent with the victim being shot while lying face-down. According to Dr. Toolsie, these wounds were fatal. Goldston also suffered blunt force trauma to the back of the head; according to Dr. Toolsie, "[Goldston] looked like he'd been struck four times with a hard, hard-edged but blunt object that caused the skin of the back of the scalp to split.

Early on the morning of Thursday, January 31, Lieutenant Dailey received a call at home ordering him back to work. According to Lieutenant Dailey, he was told only "that someone had called in with a tip about Drew Kirkman, and that they had gone over to get him and were bringing him down." Lieutenant Dailey later learned that Boring had called in the tip; however, the record is devoid of any information regarding the contents of the tip, the time at which Boring contacted police, or who took Boring's initial statement. Nobody who talked to Boring testified at trial, and Boring's trial testimony did not include information about his initial tip to police. Lieutenant Dailey testified that he arrived at the police station at 1:30 a.m. and that the defendant was already present when he arrived. Lieutenant Dailey testified that he took a statement from Boring as well as from the defendant.[3]

At the suppression hearing, the defendant testified that after arriving at work late Tuesday night, several officers arrived at his workplace and entered his work area.[4] The defendant claimed that he was under the influence of drugs that evening, but he also claimed that he was doing nothing wrong at the time the police confronted him. The defendant claimed the police grabbed him, made him stand up, and then placed his arms behind his back and searched him. According to the defendant, the police took his cigarettes and keys, and he had nothing else in his pockets at the time. Then, the defendant claimed the police handcuffed him and led him outside.[5] The defendant asked

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[3] It is unclear from the record when Lieutenant Dailey took Boring's statement. At trial, Boring testified that he gave a formal statement at the Cleveland police station at 1:56 a.m. Presumably, this means that Boring gave his statement to police after the defendant had been brought to the police station but before Lieutenant Dailey spoke to the defendant. Furthermore, the contents of Boring's statement are unclear from the record as this statement is not included in the record and neither Boring nor Lieutenant Dailey testified as to Boring's statement.

[4] None of the officers involved in the defendant's arrest testified at any point during the proceedings. However, in the preliminary hearing, reference was made to the affidavit which Officer Bill Parks made in connection with the simple possession case, in which he stated that he first arrived at the defendant's workplace at 1:42 a.m. This testimony conflicted with that of Lieutenant Dailey, who claimed that the defendant was already at the Cleveland police station when he arrived at his office at 1:30 a.m.

[5] In his initial statement to police, the defendant claimed he was searched after the police handcuffed him.

the police why he was under arrest; according to the defendant, one of the officers said "You're not under arrest. You're going to tell us what we want to know." The defendant said that another officer then approached him; this officer did not search the defendant, but he showed the defendant a bag of marijuana and stated that the defendant was under arrest for simple possession of marijuana. According to the defendant, the police transported the defendant to the Cleveland Police Department, where the officers left him shackled and handcuffed to a wooden bench. The defendant claimed he was chained to the bench leaning backward, so that he could not lie down or get comfortable. The defendant claimed he was in that position for at least a couple hours before he spoke to Lieutenant Dailey.

Mike Kelley, a former coworker of the defendant's, testified that he was working with the defendant the morning the defendant was taken to the police station. Kelley stated that "eight or nine" officers arrived and took the defendant away. Kelley stated that the defendant did not appear to be under the influence of drugs at the time he left the store. Kelley stated that he did not witness the police search the defendant and did not remember hearing any officer saying anything about the defendant possessing any marijuana.

According to Lieutenant Dailey, he interviewed the defendant in his office at the Cleveland Police Department. The transcript of the interview indicates that it began at 2:33 a.m. and ended at 3:33 a.m. During the interview, the defendant denied involvement in the victims' murder. The defendant named several persons with whom he associated and did drugs, including a woman named Robin Fiveash. Lieutenant Dailey testified that the defendant signed a Miranda waiver before the interview, and that during the interview the defendant did not appear to be under the influence of drugs or alcohol, appeared to understand the questions asked of him, did not say that he did not wish to speak to police, and did not ask to speak to an attorney.

Late in the interview, Lieutenant Dailey asked the defendant about what type of shoes the defendant wore. The defendant responded that he owned a pair of K-Swiss shoes. The officer asked if he could go to the defendant's apartment and take an impression of the shoes. The defendant replied that the officer could do so. According to Lieutenant Dailey, he and the defendant then went to the defendant's apartment, where Lieutenant Dailey located the shoes in a tied garbage bag located next to a garbage can. Lieutenant Dailey then asked the defendant if he could take the shoes; the defendant replied that the officer could take them. Lieutenant Dailey then took the shoes and the other contents of the bag, some of which contained blood, into custody. TBI Agent Everett's tests confirmed that the shoes contained Candace Clayton's blood. However, TBI Special Agent Linda Littlejohn testified that although the defendant's shoes were consistent with prints left at the crime scene, no unique identifying marks could lead her to conclusively state that the defendant's shoes made the prints left at the crime scene.

At 7:00 a.m. on January 31, a search warrant was issued for the defendant's residence. However, Lieutenant Dailey testified that nothing of evidentiary value was obtained from the search conducted pursuant to the warrant.

According to the defendant, he was transported from the Cleveland Police Department to the Bradley County Justice Center at 9:30 a.m. on January 31. The defendant said he was held shackled in the "drunk tank" until his hearing before the magistrate at 1:30 that afternoon. The defendant claimed that at the probable cause hearing,[6] he was unable to ask for bond because Shari Tayloe, an Assistant District Attorney, "stood up and said that she was going to try to get a violation on me, that she believed I was on probation." The defendant claimed that after the hearing at which the defendant was charged with possession of marijuana and apparently denied bond, he was held for a while in the Justice Center before being transported back to the Cleveland Police Department. The defendant claimed that he asked for a phone call and asked to speak to a lawyer, but these requests were denied.

At trial, Elvenia Franklin testified that at some point on January 31, the defendant did call her. Franklin said that the defendant asked her to bring the typewriter and gun he had given her to Lieutenant Dailey "so he could prove he wasn't the only one involved." Franklin said that she brought the typewriter to police but that she threw the gun into a creek. Franklin eventually pointed police to the creek where she deposited the gun, and the gun was recovered. TBI Special Agent Don Carman testified that his tests confirmed that the gun, a .22 caliber pistol, was used during the offense.

At some point on the afternoon of January 31, Robin Fiveash, one of the persons mentioned in the defendant's initial statement, was contacted by police. According to Lieutenant Dailey, Fiveash gave a statement "in confidence" to Detective Robert Harbison because "she didn't want Mrs. Fallis to know what she was saying." Fiveash told Detective Harbison that she saw the defendant place several items into a dumpster located at the Superior Cash Mart, located next door to his apartment. After gaining permission from a worker at the market, Dailey and other Cleveland Police officers searched the dumpster, retrieving a coffee table leg that appeared to be from the victims' apartment, several knives, a knife handle that was missing its blade, victim Clayton's pocketbook, Post-It notes addressed to "Drew," and some bloody gloves. TBI Agent Everett testified that his tests confirmed that the victims' blood was on the gloves. Agent Everett testified that a broken knife blade retrieved from the dumpster tested positive for victim Goldston's blood,[7] as did a knife handle retrieved from the dumpster. Agent Everett's report indicated that the table leg

[6] The defendant's account of the hearing before the magistrate is the only account that appears in the record, as nobody else present at the hearing testified at any point during the instant proceedings.

[7] This blade was not the one pulled from Goldston's body. The record appears to indicate that the blade pulled from Goldston was not tested for blood.

retrieved from the dumpster tested positive for Goldston's blood, and although Clayton's blood did not appear on the table leg, Dr. Toolsie testified that the table leg "could very well have" inflicted the bruising patterns discovered on her body.

Following her initial, unrecorded statement to police, Fiveash gave a statement to police the afternoon of January 31. In that statement, Fiveash did not mention the dumpster. Fiveash did not mention the defendant placing items in the dumpster in a formal, recorded statement to police until Friday, February 1, after the police had actually retrieved the items from the dumpster.

At 7:02 p.m. on Thursday, January 31, the defendant gave a second statement to Lieutenant Dailey. According to the officer, the defendant voluntarily signed an admonition and waiver form. Lieutenant Dailey stated that shortly after signing the waiver, the defendant asked to take a break and smoke a cigarette. Lieutenant Dailey granted the defendant's requests, after which the defendant's statement resumed. According to Lieutenant Dailey, the defendant did not appear to be under the influence of drugs and appeared to understand the questions he was asked. The officer also said that the defendant did not state that he wished to speak to an attorney and did not ask to end the discussion. According to Lieutenant Dailey, the only issue the defendant raised with him was that the defendant "felt like that I told him he could make bond and then he didn't get to. And then I advised him, 'I set a bond on it. I can't help what happened once you got in front of the Judge.'" The defendant then gave an account of the events that led to the victims' deaths.

At the suppression hearing, the defendant claimed that he did not sign the admonition and waiver form. When shown the admonition and waiver form, the defendant claimed that the signature that appeared on the "signature" line did not match his signature. The defendant claimed that he asked for a lawyer before making the second statement, but defense counsel ultimately admitted that no mention of the defendant asking for a lawyer actually appears in the transcript of the interview. The defendant also claimed that the police knew about his history of mental illness and treatment for that illness. At the preliminary hearing, Lieutenant Dailey admitted that the defendant's criminal history was run "an hour or so after the first interview," and upon seeing the defendant's criminal history, he discovered that the defendant had been found not guilty in a previous homicide case by reason of insanity.

ANALYSIS

Legality of Defendant's Statements to Police and Evidence Resulting from Statements

The defendant contends that his seizure and warrantless arrest were illegal in that the police did not have probable cause or an articulable suspicion at the time of his seizure. The defendant also contends that because his seizure and subsequent arrest were illegal, the trial court erred in failing

to suppress the statements made by the defendant following his arrest, as well as the evidence gathered by police as a result of the statements.

At the conclusion of the suppression hearing, the trial court overruled the defendant's motion to suppress his statements to police and the evidence resulting from those statements. In so holding, the court noted that it "didn't place much on [the defendant's] credibility," based on the defendant's stating that he did not sign a Miranda waiver before the second statement when the trial court determined that the defendant had in fact signed the statement. The trial court also found that the defendant was given Miranda warnings before each statement, and that he had properly waived his Miranda rights prior to each statement. The trial court also noted that "there was . . . evidence that there was marijuana found on him at the time he was picked up."

A trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Id. Both proof presented at the suppression hearing and proof presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998); State v. Perry, 13 S.W.3d 723, 737 (Tenn. Crim. App. 1999). However, the prevailing party "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from the evidence." Odom, 928 S.W.2d at 23. Furthermore, an appellate court's review of the trial court's application of law to the facts is conducted under a de novo standard of review. State v.Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citations omitted).

To address the defendant's concerns, we must first determine whether the defendant was "seized" for Fourth Amendment purposes and if the seizure was legal. In relation to the Fourth Amendment, Tennessee courts have recognized three distinct types of interactions between law enforcement and citizens: "(1) a full scale arrest which must be supported by probable cause; (2) a brief investigatory detention which must be supported by reasonable suspicion; and (3) brief police-citizen encounters which require no objective justification." State v. Daniel, 12 S.W.3d 420, 424 (Tenn. 2000) (citations omitted). Furthermore, "'[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" Id. (quoting Terry v. Ohio, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). In other words, "a 'seizure' implicating constitutional concerns occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave." Id. (citations omitted). Whenever an officer accosts an individual and restrains the freedom to walk away, the officer has "seized" that person for Fourth Amendment purposes. State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997).

In this case, the defendant was arrested without a warrant. Our supreme court has defined an arrest as "the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest." State v. Crutcher, 989 S.W.2d 295, 301 (Tenn. 1999) (citations omitted). A warrantless arrest, like a warrantless seizure, "is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the [arrest] was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997) (citations omitted). In Tennessee, a warrantless arrest may be made in certain instances, including "[f]or a public offense committed . . . in the officer's presence" or "[w]hen a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested has committed the felony." Tenn. Code Ann. § 40-7-103(a)(1), (3). While the statute does not define "reasonable cause," our courts have held that a warrantless arrest must be based on "probable cause [that] must be more than mere suspicion." State v. Melson, 638 S.W.2d 342, 350 (Tenn. 1982).

In various phases of these proceedings, the state has characterized the defendant's arrest as valid based both on his possession of marijuana and the fact that the defendant, by testing positive for various drugs, violated terms of his probation and thus gave the police valid grounds to arrest him regardless of the fact that a probation revocation warrant had not been issued at the time of his arrest. Regarding possession of marijuana, for the defendant's seizure and subsequent warrantless arrest to have been valid, the police must have known that the defendant was in possession of marijuana at the time of his seizure. However, the police did not discover the marijuana until after the defendant had been seized and apparently had no other way of knowing that the defendant was in possession of marijuana prior to his seizure. Therefore, the police did not have the requisite probable cause to arrest the defendant on this basis. Additionally, the state's assertion that a person's violation of probation gives the police the right to arrest the individual regardless of whether a revocation warrant has been filed is not supported by relevant case law or statutory authority. See, e.g., Tenn. Code Ann. § 40-35-311(a) (procedures for revoking suspension of sentence or probation require a trial judge to issue an arrest warrant). As such, we conclude that the defendant's arrest was not supported by probable cause and was therefore illegal.

Having reached the conclusion that the defendant was illegally arrested, we must then determine the admissibility of the defendant's statements to police following his arrest. Our supreme court has held:

> Under both the federal and state constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.

State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032 (1971); State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992)). However, even if an arrest is illegal, a defendant's statement need not be suppressed "if it was voluntary under the Fifth Amendment and there were sufficient intervening circumstances to break the causal connection between the illegal arrest and the confession, so that the confession is 'sufficiently an act of free will to purge the primary taint.'" State v. Burtis, 664 S.W.2d 305, 308 (Tenn. Crim. App. 1983) (citing Brown v. Illinois, 422 U.S. 590, 602, 95 S.Ct. 2254, 2261 (1975) and Taylor v. Alabama, 457 U.S. 687, 102 S.Ct. 2664, 2667(1982)). "The fact that a confession may be voluntary for purposes of the Fifth Amendment is not by itself sufficient to purge the taint of an illegal arrest." Id. Rather, "[t]he relevant inquiry is whether the confession was obtained by exploitation of the illegal arrest." Id. (citing Dunaway v. New York, 442 U.S. 200, 217, 99 S.Ct. 2248, 2259 (1979)). Although Brown, Burtis, and related cases reference confessions, our supreme court has indicated that the above test applies to all statements made to police following an illegal arrest, not just confessions. See State v. Huddleston, 924 S.W.2d 666, 674 (Tenn. 1996).

In determining whether a statement has been purged of the taint of the original arrest, the appellate court must address: (1) the giving of proper Miranda warnings; (2) the temporal proximity of the arrest and the statement; (3) the presence of intervening circumstances; and, particularly, (4) the purpose and flagrancy of the official misconduct. Burtis, 664 S.W.2d at 308-09 (citing Brown v. Illinois, 442 U.S. 590, 603-604, 95 S.Ct. at 2261-2262 (1975) and State v. Chandler, 547 S.W.2d 918, 920 (Tenn.1977)).

In reviewing the first statement made by the defendant to police, we recognize that the defendant was given proper Miranda warnings and signed an admonition and waiver form at the time of the statement. However, the other Burtis factors strongly preponderate against admitting the defendant's statement. The defendant's statement to police began at 2:33 a.m. on January 31. Although it is unclear exactly when the defendant was apprehended at his place of employment, our review of the record indicates that the defendant was apprehended at some point between midnight and 1:42 a.m., meaning that the defendant's statement took place less than two and a half hours after he was brought into custody. No other "intervening circumstances" took place between the arrest and the statement, and even if the defendant's claim that he was uncomfortably shackled to a wooden bench at the Cleveland police station is discounted, the means by which the defendant was brought into custody constituted purposeful and flagrant misconduct. Therefore, we conclude that the trial court erred in refusing to grant the defendant's motion to suppress this initial statement.

The defendant's second statement to police, including his confession, however, is another matter. The defendant testified that he was brought before the magistrate at 1:30 p.m. on January 31. Although the results of that hearing are not included in the record, we can reasonably conclude that the magistrate found probable cause to hold the defendant. Six hours later, at 7:32 p.m., the defendant made his second statement to police. In this instance, the application of the Burtis factors

preponderate in favor of admitting the defendant's statement. Although the defendant claimed that he did not sign the admonition and waiver, the trial court found that the defendant did in fact sign the waiver and was given proper Miranda warnings. The statement occurred at least eighteen hours after he was initially brought into custody and six hours after the defendant was brought before the magistrate. The Supreme Court has held that a defendant's appearance before the magistrate, at which he would be advised of his rights and bail would be set (or denied, in this case), constitutes a sufficient "intervening circumstance" under which subsequent proceedings would be "conducted not by 'exploitation' of the challenged arrest but 'by means sufficiently distinguishable to be purged of the primary taint.'" Johnson v. Louisiana, 406 U.S. 356, 396, 92 S. Ct. 1620, 1626 (1972) (quoting Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)). Finally, the questioning of the defendant after additional evidence had been discovered—a fact that had been revealed to the defendant—did not constitute purposeful or flagrant misconduct. Thus, the trial court did not err in denying the defendant's motion to suppress the second statement.

Having determined the admissibility of the defendant's statements to police, we now address the admissibility of the items recovered as a result of these statements. Regarding the K-Swiss tennis shoes containing victim Clayton's blood, we note that at the close of the defendant's first statement to police, he gave Lieutenant Daily permission to search his apartment and take "an impression" of the shoes. When Lieutenant Dailey noticed the defendant's tennis shoes inside the apartment, the officer asked for, and was given, permission to take the actual shoes. The Supreme Court has held that "[o]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). However, "[i]f consent is given after an illegal seizure, that prior illegality taints the consent to search." United States v. Richardson, 949 F.2d 851, 858 (6th Cir. 1991) (citations omitted); see Huddleston, 924 S.W.2d at 674. The test for admissibility of evidence when the consent to search is based upon an illegal arrest is twofold: not only must the consent be voluntary, but the consent must also be "sufficiently an act of free will to purge the primary taint." Wong Sun, 371 U.S. at 486, 488; see Brown, 422 U.S. at 602. In conducting this analysis, the court will proceed under the four-part analysis outlined in Burtis. See Huddleston, 924 S.W.2d at 674-75.

In this case, the defendant's consent to search his apartment was given at the end of his first statement to police. The defendant was given proper Miranda warnings before the statement and the transcript of the statement indicates that the police did not coerce or pressure the defendant into consenting to the search of his apartment. However, the other Burtis factors preponderate against finding that the consent to search was voluntary and purged of the taint of the defendant's illegal arrest. The consent to search, and the resulting consent for police to take the defendant's tennis shoes, were given less than three hours after the defendant had been arrested, and no intervening circumstances existed to attenuate the taint of the illegal arrest, which itself constituted flagrant and purposeful misconduct on the part of the police. Thus, we conclude that the shoes were illegally obtained and improperly admitted into evidence.

The admissibility of the items recovered from the convenience store dumpster, many of which tested positive for the victims' blood, warrants closer scrutiny. The items were discovered after Fiveash, a person mentioned by the defendant in his initial statement to police, informed police that the defendant had placed several items in a convenience store dumpster. The police then gained consent of a convenience store worker to search the dumpster. While it has long been held that physical evidence directly resulting from an illegal arrest must be suppressed, state and federal case law provide little guidance as to whether physical evidence must be suppressed if the evidence results not from the illegal arrest itself, but from a third person identified by the defendant through the illegal arrest. The closest our courts have come to addressing the issue occurred in State v. Story, 608 S.W.2d 599 (Tenn. Crim. App. 1980). In that case, this court addressed "whether the [trial] testimony of witnesses whose identities are discovered by a defendant's illegally obtained and inadmissible statement should likewise be held inadmissible." Id. at 602. In Story, a case involving both Fourth Amendment and Fifth Amendment violations, this court cited to a Supreme Court opinion which held that the ultimate test in determining the admissibility of witness testimony when the witness' identity was discovered by an illegal search is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" United States v. Ceccolini, 435 U.S. 268, 273-74, 98 S. Ct. 1054, 1059 (1978) (citing Wong Sun, 371 U.S. at 487). The Wong Sun court fashioned the question another way: "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun, 371 U.S. at 488 (citation omitted).

This court in Story, applying Ceccolini, held that there was sufficient attenuation "to dissipate the connection between the illegal arrest, the Miranda violation, and the testimony of the witness." Story, 608 S.W.2d at 602. The court noted that the disputed witnesses

> were ordinary citizens whose testimony was in no way coerced or induced by governmental action. They were not initially questioned at the same time and place that the appellant made his statements, and the trial was conducted a full year after the violation. The witnesses would probably have been discovered anyway.

Id.

Application of the "independent means" or "degree of attenuation" test established by the Supreme Court in Wong Sun and further illuminated in Ceccolini leads us to conclude that the items recovered from the convenience store dumpster—which were not mentioned in the defendant's initial statement to police—were sufficiently purged of the taint of the defendant's illegal arrest and were therefore admissible. Fiveash was discovered through the defendant's initial, illegally obtained statement, and nothing appears in the record to suggest that the police would have discovered Fiveash absent the defendant's statement. However, the police contacted Fiveash several hours after

the defendant's arrest and initial statement to police. Furthermore, Fiveash could have refused to talk to police, but she instead chose to cooperate. No evidence exists to suggest that Fiveash's statements to police were coerced or otherwise involuntary. Additionally, after police discovered the location of the dumpster, the police requested, and were granted, permission to search the dumpster. The police ultimately recovered the dumpster items based upon the independent decisions of Fiveash to talk to police and of the convenience store worker to permit police to search the store's dumpster. These independent decisions serve as sufficient attenuation to purge the evidence recovered from the dumpster of the taint of the defendant's illegally obtained statement. Thus, this evidence was properly admitted into evidence.

Harmless Error

Our conclusion that the trial court improperly admitted the defendant's first statement and his tennis shoes into evidence does not conclude our analysis. We must determine whether the trial court's ruling regarding the first statement and the shoes entitles the defendant to relief. Our supreme court has explained the application of the harmless error doctrine to constitutional violations occurring during a criminal trial:

> In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the United States Supreme Court rejected the proposition that all federal constitutional errors that occur in the course of a criminal trial require reversal. The Chapman Court held that the Fifth Amendment violation of prosecutorial comment upon the defendant's failure to testify would not require reversal of a conviction if the State could show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24, 87 S.Ct. at 828. The Chapman standard recognizes that "certain constitutional errors, no less than other errors, may have been 'harmless' in terms of their effect on the factfinding process at trial." Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986).
>
> Since Chapman, the Court has "repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Id.

Momon v. State, 18 S.W.3d 152, 163-64 (Tenn. 1999).

In this case, the trial court committed error by admitting into evidence the defendant's initial statement to police and the defendant's shoes, which resulted from the initial statement. However,

we conclude that this error was harmless beyond a reasonable doubt. The defendant's initial statement consisted largely of the defendant denying that he was at the scene of the incident and that he committed the murders. This statement was not inculpatory and did not contribute to the defendant's guilty verdict. Therefore, any error the trial court committed in admitting the statement was harmless beyond a reasonable doubt. See State v. Damiean Devon Tolson, No. M2005-01085-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Dec. 28, 2006), app. denied, (Tenn. Apr. 16, 2007). Regarding the defendant's tennis shoes, the shoes contained the victim's blood and placed the defendant at the murder scene. However, other properly admitted evidence, such as the defendant's second statement to police, the items from the victim's apartment recovered from the convenience store dumpster, and Elvenia Franklin's testimony regarding the defendant's involvement in the shooting, is sufficient to support the jury's verdict in the case. As such, the trial court's admission of the tennis shoes, while error, was harmless beyond a reasonable doubt. The defendant is therefore denied relief regarding his motions to suppress.

Propriety of State's Closing Argument

The defendant contends that the trial court erred in failing to grant a mistrial based on improper statements made by the prosecutor during his closing statement. During his rebuttal to the defendant's closing argument, the prosecutor stated:

> [Prosecutor]: I invite you to take [the club recovered from the crime scene] back and look at it. Whose blood did this have on it? It had Ms. Clayton's and it had Mr. Goldston's. This is the club [the defendant] said he had.
>
> Now I want to ask you this also. [The defendant] says he only hit one person, and he threw it in the closet. How did it get both their blood on it? And what I haven't noticed, and maybe until today . . . see what's hanging from this? That's blond hair.

Defense counsel objected to the statement, claiming that the prosecutor's assertion was not supported by the record. Defense counsel's assertion was correct, for while Lieutenant Dailey testified that the club he recovered at the crime scene appeared to contain hair, neither he nor the TBI agent who tested the club testified as to the color or source of the hair. The trial court sustained the objection. A bench conference followed:

> [Prosecutor]: How can there be no proof if there's not blond hair hanging there.

> [The Court]: There is no proof that it is.
>
> [Defense Counsel]: There's no proof the lady had blond hair. There's no serology—
>
> [Prosecutor]: Yes sir, there is. There most certainly is.
>
> [Defense Counsel]: —report saying any proof was developed that's been introduced in this case.
>
> . . . .
>
> [Prosecutor]: But there is proof, Judge. There's a picture of her driver's license where she has blond hair.
>
> [Defense Counsel]: There is no serology report saying that's human hair, not one thing.
>
> [The Court]: Here's the problem (indiscernible) it's not up to you to give us evidence. You can't interject your own observations . . .

A jury-out hearing was then held, at which defense counsel continued to argue for a mistrial:

> [Defense Counsel] . . . [F]or him to say that—hold that club up and say that is human hair and that it's a particular color when there's no evidence in here is, is ringing a bell that can't be un-rung, and there is not evidence that's been introduced to show that. . . . I was cross-examining a fellow says they checked some things that were off a dog bed. Do we know whether it's a Lhasa Apso or a Collie with long hair and that club was used to make the dog go where you need[ed] it to? . . . There's no report saying that was human hair, and now today the General wants to do a scientific declaration to this jury that that's human hair. Why the heck didn't they test it if it was human hair and get a sample and compare it?

> [The Court]: Well . . . that's one of the things I wondered when you introduced that, when it was becoming evident that nobody ever tested that for hair.

The trial court denied the defendant's motion for a mistrial, but it did issue a curative instruction to the jury, asking it to "disregard any statements [the prosecutor] made pertaining to what those fibers, what he believed those fibers to be and disregard any remarks he made pertaining to that particular issue."

Our supreme court has recognized that closing argument is a valuable privilege for both the state and the defense and that counsel is afforded wide latitude in presenting final argument to the jury. See State v. Cribbs, 967 S.W.2d 773, 783 (Tenn.1998); State v. Cone, 665 S.W.2d 87, 94 (Tenn. 1984). However, a party's closing argument "must be temperate, predicated on evidence introduced during trial, relevant to the issues being tried, and not otherwise improper under the facts or law." State v. Middlebrooks, 995 S.W.2d 550, 568 (Tenn. 1999). A party "must be given the opportunity to argue not only the facts in the record but any reasonable inferences therefrom." Id. (citing Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976)).

When a prosecutor's argument goes beyond the latitude afforded, the test for determining if reversal is required is whether the impropriety "affected the verdict to the prejudice of the defendant." Harrington v. State, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965); see also Middlebrooks, 995 S.W.2d at 559. Factors relevant to that determination include: (1) the disputed conduct viewed in light of the circumstances and facts in the case; (2) any curative measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case. Middlebrooks, 995 S.W.2d at 559 (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). When considering whether a mistrial should have been granted, this court is bound by the principle that the decision of whether to grant a mistrial is within the sound discretion of the trial court, State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996), and the trial court's ruling will not be disturbed absent a finding of an abuse of discretion. State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990).

In this case, the prosecutor's remark was not improper. In light of the evidence, the prosecutor's statement that the hair found on the broken club was blond was a reasonable inference. Defense counsel could have argued, as he did in his objection to the prosecutor's statement, that the hair belonged to a dog. The jury could have considered the evidence offered by both sides and made an informed decision. Even if the prosecutor's statement was not a reasonable inference, the comment was fleeting and isolated, and the trial court issued a curative instruction. On appeal we must assume that the jury followed the trial court's explicit instructions not to consider the particular comment. State v. Smith, 893 S.W.2d 908, 923 (Tenn. 1994). Furthermore, in his brief, the

defendant fails to explicitly show how the prosecutor's comment prejudiced the defendant, as is required. As such, the defendant is not entitled to relief on this issue.

Consecutive Sentences

The defendant claims that the trial court improperly sentenced the defendant to consecutive sentences for first degree murder, conspiracy to commit murder, and aggravated robbery because the crimes arose out of the same transaction and were parts of the murder conviction proof necessary to establish the murder conviction. However, the defendant does not cite to any portion of the record in support of his argument, nor does he cite to any relevant case law. Such omissions violate the requirements of Rule 10(b) of the Tennessee Court of Criminal Appeals and Rule 27(a) of the Tennessee Rules of Appellate Procedure and operate as a waiver of the issue on appeal. Furthermore, the defendant states that "there is no specific authority to support" his assertion on appeal. As such, the defendant is not entitled to relief on this issue.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

_____
D. KELLY THOMAS, JR., JUDGE